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No. 94-771

In The

Supreme Court of the United States

October Term, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE MUSCOGEE (CREEK) NATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a state may regulate and tax commerce between a state motor fuel wholesaler and an Indian tribe.

TABLE OF CONTENTS

Page

CONSENT TO FILING..... 1

INTEREST OF *AMICUS CURIAE*..... 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT 4

States May Not Tax Indian Tribes..... 9

Legislative Not Judicial Response Available..... 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES:

Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976) 11

Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160, 100 S.Ct. 2592, 65 L.Ed.2d 684 (1980) 10

Chickasaw Nation v. Oklahoma Tax Commission, 31 F.3d 964 (10th Cir. 1994) 2, 14

Chouteau v. Burnett, 283 U.S. 691, 51 S.Ct. 598, 75 L.Ed. 1353 (1931) 10

Dean Milk Company v. City of Madison, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951) 8

Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 6 L.Ed. 23 (1824) 2, 8

Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941) 8

McClanahan v. Arizona Tax Commission, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) 10

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 35 L.Ed.2d 114 (1973) 10

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) 11

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985) 10

Montana v. Crow Tribe of Indians, 484 U.S. 997, 108 S.Ct. 685, 98 L.Ed.2d 683 (1988) 10

TABLE OF AUTHORITIES – Continued

Page

Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982) 10

Rice v. Sioux City Memorial Park Cemetery, 749 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955) 4

The Crow Tribe of Indians v. Montana, 819 F.2d 895 (9th Cir. 1987) 11

The Kansas Indians, 72 U.S. (5 Wall) 737, 18 L.Ed. 667 (1866) 10

Transportation Co. v. Parkersburg, 107 U.S. (17 Otto) 691, 2 S.Ct 732, 27 L.Ed. 584 (1883) 3

Warren Trading Post Co. v. Arizona State Tax Commission, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d (1965) 9, 10

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980) 10

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832) 4

CONSTITUTION, TREATIES, STATUTES, AND RULES:

68 O.S. 1991 §§ 502 *et seq.* 2

Act of June 30, 1902, ch. 1323 § 10 12

Articles of Confederation, art. IX, ¶ 5 6

Sup.Ct. R. 10.1 4

Sup.Ct. R. 37.3 1

Treaty with the Chickasaw, 7 Stat. 24 (Jan. 10, 1786) 3

TABLE OF AUTHORITIES – Continued

Page

Treaty with the Creeks, 1856; 11 Stat., 699, art. 4 (Aug. 7, 1856) 3

Treaty of March 24, 1832, 7 Stat. 366, art. XIV..... 2

Treaty with the Creek of June 14, 1866, 14 Stat. 785, art. XII 2

U.S. Const. art. I, § 8, cl. 3 3

MISCELLANEOUS:

Advisory Commission of Intergovernmental Affairs, *Significant Features of Fiscal Federalism: Volume 2: Revenues and Expenditures*; October, 1991, p. 53 13

Angie Debo, *A History of the Indians of the United States* 4 (Norman, 1970)..... 1

Angie Debo, *And Still the Waters Run* 5 1

Joseph Story, *Commentaries on the Constitution* §§ 533-534 (Carolina Academic Press 1987) (1833) 7

Rev. Rul. 67-284, 1967-2 C.B. 55 11

Robert N. Clinton, *et al., American Indian Law* 28 (3rd ed. Michie Co., Va., 1991)..... 4

Thomas James Norton, *The Constitution of the United States, Its Sources and Its Applications* 51 (The World Pub. Co., Cleveland & New York, 8th ed., June 1943) 6

"Economic Impact of Tribal Tax and Expenditure Programs in the State of Oklahoma" Summary of Findings Prepared for the George Washington University Center for Native American Studies and Indian Policy Developments and the Oklahoma State Indian Affairs Commission p. 6 (Jan. 1992)..... 13

COMES NOW the Muscogee (Creek) Nation and submits the following brief pursuant to Sup.Ct. R. 37.3.

CONSENT TO FILING

The parties have consented to the Muscogee (Creek) Nation appearing as *amicus curiae.* Letters memorializing this consent will be filed simultaneously with the filing of this brief.

INTEREST OF *AMICUS CURIAE*

Amicus curiae is the Muscogee (Creek) Nation (hereafter "Muscogee"), a federally-recognized Indian tribe, whose national capital is located near Okmulgee, Oklahoma. The Muscogee exercise jurisdiction over Indian country that overlaps 11 counties created by the State of Oklahoma, *e.g.*, Tulsa is an "Old Creek town."[1] The Muscogee, like the respondent (Chickasaw Nation) are one of the Five Nations, formerly known as the Five Civilized Tribes, removed on the "Trail of Tears"[2] to Indian Territory from their homelands in

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[1] Angie Debo, *A History of the Indians of the United States* 4 (Norman, 1970).

[2] "The tragic suffering of the exiles on the Trail of Tears is familiar to all students of American history. It is matched only by the saturnalia of exploitation to which they were subjected by land speculators who crowded them from their homes before the time fixed for their emigration, and who possessed themselves of their individual allotments by every possible combination of violence and fraud." Angie Debo, *And Still the Waters Run* 5 (4th ed. Princeton Paperback Printing, 1991).

Georgia and Alabama. Within their Indian country, the Muscogee are wholesalers and retailers of various products, including motor fuel. The Muscogee interest in this suit is that Oklahoma has imposed regulations and taxes on motor fuel trade with Indian tribes. Further, the decision below is premised, in part, on promises by the federal government to respondent that appears in Muscogee treaties.[3]

SUMMARY OF ARGUMENT

Oklahoma's regulatory and taxing scheme[4] improperly burdens Indian commerce by requiring Indian traders selling fuels[5] to Indian tribes to collect a state-imposed tax on the purchaser who is an Indian tribe. The Tenth Circuit Court of Appeals held that this state taxation of an Indian tribe was improper. *Chickasaw Nation v. Oklahoma Tax Commission*, 31 F.3d 964, 972-973 (10th Cir. 1994). The Oklahoma Tax Commission's petition for review by *certiorari* should be denied because the Tenth Circuit opinion is consistent with many previous decisions of this court and because Oklahoma has a legislative (not judicial) remedy. Oklahoma's effort to tax Indian tribes is not consistent with the specific constitutional

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[3] *See* Treaty of March 24, 1832, 7 Stat. 366, art. XIV and Treaty with the Creek of June 14, 1866, 14 Stat. 785, art. XII cited by petitioner at page 28 of the "Petition for a Writ of Certiorari."

[4] 68 O.S. 1991 §§ 502, 502.2, 502.6, 516, 520, 522 (motor vehicle fuel) and §§ 502.1, 502.3, 502.5, 502.7, 522.1 (diesel fuel).

[5] The "power to regulate commerce . . . [is the power] to prescribe the rule by which commerce is to be governed." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196, 6 L.Ed. 23 (1824)

delegation of the authority for Congress to regulate trade with Indian tribes. U.S. CONST. art. I, § 8, cl. 3. This authority was not delegated to the federal judiciary[6] nor to state legislatures.

The power to regulate Indian trade is specifically granted to Congress. This grant, like the other portions of the Commerce Clause ("among the States" and "with Foreign nations"), was an explicit recognition of the need for one authority (the federal legislature, not the states) to regulate trade with Indian tribes. An implicit reason for this grant of authority was to protect the federal interest in treaties negotiated and to be negotiated by the United States with Indian tribes.[7] Had the states the authority to regulate and tax Indian trade, tribes undoubtedly would

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[6] "It is the congress, and not the judicial department, to which the constitution has given the power to regulate commerce . . . The courts can never take the initiative on this subject." *Transportation Co. v. Parkersburg*, 107 U.S. (17 Otto) 691, 701, 2 S.Ct. 732, 27 L.Ed. 584 (1883).

[7] Prior to ratification of the Constitution, Indian treaties included clauses such as: "[The tribes acknowledge that they are] under the protection of the United States and of no other sovereign whatsoever . . . For the benefit and comfort of the Indians, and for the prevention of injuries and oppression on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians." *Treaty with the Chickasaw*, 7 Stat. 24 (Jan. 10, 1786). Most treaties subsequent to the adoption of the constitution contained specific guarantees by the federal government to protect tribes from state incursion on tribal jurisdiction. *See, e.g., Treaty with the Creeks, 1856*; 11 Stat., 699, art. 4 (Aug. 7, 1856) ("The United States do hereby, solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek.").

not exist today.[8] Oklahoma should not be permitted to regulate and tax Indian commerce because same is a usurpation of federal constitutional authority and contrary to federal law including numerous treaties.

ARGUMENT

Petition for writ of *certiorari* is granted "only when there are special, important reasons therefor." Sup.Ct. R. 10.1. *See also Rice v. Sioux City Memorial Park Cemetery*, 749 U.S. 70, 73-74, 75 S.Ct. 614, 99 L.Ed. 897 (1955). The Oklahoma Tax Commission (Petitioner) has not posited any such "special and important" issue. The purported

[8] When the political situation was advantageous, states have unlawfully seized unilateral remedies to deprive tribes of rights protected by federal law. Just such a situation existed when this court decided *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832). "Conflict between state and tribal government was not, however, all that was involved in *Worcester*. . . . The unilateral legislative action of the state of Georgia, and similar actions taken simultaneously by Mississippi, Tennessee, and other states, were in part attributable to the election of Andrew Jackson as president. Jackson was perceived as an avowed enemy to Indian interests in the affected states (despite his military alliance with some of the affected tribes), and these states properly perceived that the federal government under Jackson's stewardship would not interfere in their unilateral extension of state authority over the tribe. Indeed, at least one historian has attributed to Jackson the following famous retort to the *Worcester* decision: 'John Marshall has made his decision; now let him enforce it.'. . . . For several years the Supreme Court decision was simply ignored – unprecedented constitutional phenomena, then and now." Robert N. Clinton, *et al.*, *American Indian Law* 28 (3rd ed. Michie Co., Va., 1991).

basis for seeking this writ is that Oklahoma should be allowed to tax Indian tribes because tribes incidentally benefit from the roads built and maintained by fuel tax revenue. *(Pet.* at 8. ["The motor fuel subject to tax is, in large measure, used *outside* of Indian country. And perhaps most significant, the tax revenues are used to defray the costs (of road construction and maintenance) imposed upon the *State* – and – *only* the State – by the use of the fuel." (emphasis in original]) This is not a new or novel issue and, further, is not accurate.

The constitutional grant of authority to Congress is "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Implicit in this language is that commerce with Indian tribes is separate and distinct from commerce with foreign nations and among the several states. However, the grant of power is identical ("to regulate") to that governing commerce "with foreign nations" and "among the several states." The federal Constitution arose from an experience with the Articles of Confederation that the central government simply had insufficient power to properly function.

> The Commerce Clause is said to have been suggested by James Monroe of Virginia, afterwards President, who believed national regulation 'necessary to preserve the union; without it, it will infallibly crumble to pieces.' As a member from 1783 to 1786 of the Congress under the Articles of Confederation, he endeavored to secure for Congress the power to regulate commerce and thereby remove what he considered the **chief defect in the existing government.**

Thomas James Norton, *The Constitution of the United States, Its Sources and Its Applications* 51 (The World Pub. Co., Cleveland & New York, 8th ed., June 1943) (emphasis added). Accordingly, the grants of powers by the states to the federal government were intentionally greatly strengthened when the Constitution was adopted by the states. This was certainly true of the portion of the Articles of Confederation that discussed trade with the Indians: "[Congress has] the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, **not members of any of the states**, provided that legislative right of any state within its own limits be not infringed or violated . . . " *Articles of Confederation*, art. IX, ¶ 5 (emphasis added), reprinted in the U.S.C.A., *Const.* art. I, p. 11.

Under the original formulation, states were given exclusive regulatory authority for tribal trade occurring within their borders and the federal government was given exclusive jurisdictional control over Indian matters outside of state borders, *e.g.*, territories. Thus, when the Constitution was adopted with the Indian Commerce Clause, the clear inference was that the federal government was granted all of the power over Indian commerce to the exclusion of the states.

> Antecedently to the American Revolution the authority to regulate trade and intercourse with the Indian tribes, whether they were within, or without the boundaries of the colonies, was understood to belong to the colonies of the British crown. And after the American Revolution, the like power would naturally fall to the federal government with a view to the general peace and interest of all the states. Two

> restrictions, however, upon the power were incorporated with and into the confederation, which occasioned endless embarrassments and doubts . . . in this case, as in some other cases, the Articles of Confederation inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the union, with complete sovereignty in the states; to subvert a mathematical axiom, by taking away a part and letting the whole remain. The constitution has wisely disembarrassed the power of these two limitations; and has thus **given to Congress, as the only safe and proper depository, the exclusive power**, which belonged to the crown in the ante-revolutionary times; **a power indispensable to the peace of the states and to the just preservation of the rights and territory of the Indians** . . .
>
> . . . It is (says a learned commentator) wholly immaterial, whether such tribes continue seated within the boundaries of a state, and inhabit part of a territory, or roam at large over lands, to which the United States have no claim. The **trade with them is, in all its forms, subject exclusively to the regulation of Congress**. And in this particular, also, we trace the wisdom of the constitution. The Indians, not distracted by the discordant regulations of different states, are taught to trust one great body, whose justice they respect, and whose power they fear."

Joseph Story, *Commentaries on the Constitution* §§ 533-534 (Carolina Academic Press 1987) (1833) (emphasis added).

The Commerce Clause has been construed to preclude any state-imposed burden on interstate trade either *per se* or preemptively if congressional enactments signal

an intention to "occupy the field." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 339, 85 L.Ed. 581 (1941). In either event, the Oklahoma taxation statutes run afoul of federal law.

The history and practicalities of Indian commerce (as undoubtedly with foreign commerce) are such that this Court should construe the Indian commerce clause as granting exclusive power. Chief Justice Marshall in the seminal Interstate Commerce case explained that the commerce power is not "in its own nature . . . capable of residing in, and being exercised by, different authorities at the same time." *Gibbons v. Ogden*, 22 U.S. at 199-200. This language is even more appropriate in describing Indian commerce. As Marshall went on to say, "[a state in regulating interstate commerce] is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do." Oklahoma's desire to collect motor fuel taxes is simply not a sufficient legal reason for judicially amending the federal constitution to give states power to regulate and tax Indian commerce.[9]

Even if the Indian commerce clause is not construed as an exclusive grant of power, Congress has clearly preempted and fully occupied the field of Indian trading. The legislative intent, except as whether congress

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[9] *Cf. Dean Milk Company v. City of Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951). A legitimate state objective does not validate state laws imposing burdens on interstate commerce.

intended to occupy the field, is not relevant to the question of federal pre-emption. Federal pre-emption will always have effects not contemplated nor intended. The intent of the federal Indian trader's statutes was, as this Court has previously held, to occupy the field of Indian commerce.

> Indian traders trading on a reservation with reservation Indians are immune from a state tax like Arizona's, not simply because those activities take place on a reservation, but rather because Congress in the exercise of its power granted in Article I, § 8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject.

Warren Trading Post Co. v. Arizona State Tax Commission, 380 U.S. 685, 691 n. 18, 84 S.Ct. 1242, 14 L.Ed.2d 165 (1965). If an incidental result of the Indian Trader Acts is that goods can be purchased cheaper in Indian country than in the surrounding state, this consequence does not *ipso facto* empower Oklahoma to ignore federal pre-emption any more than a similar price differential would authorize Oklahoma to regulate trade with Kansas or Texas. Tax rate differentials among communities exist everywhere and do not lose their validity because one community has a lower rate, nor should they lose their validity simply because the community happens to be composed of Indians.

States May Not Tax Indian Tribes

Oklahoma is asking this court to review the Tenth Circuit opinion that states may not tax Indian tribes. The

Tenth Circuit holding is not new or novel, but wholly consistent with a long line of cases decided by this court extending back to nationhood. *See, e.g., The Kansas Indians*, 72 U.S. (5 Wall.) 737, 18 L.Ed. 667, 673 (1866) (Indian lands are withdrawn from the operation of state laws and may not be taxed); *Chouteau v. Burnett*, 283 U.S. 691, 51 S.Ct. 598, 601, 75 L.Ed. 1353 (1931) (individual tribal member's share of income received from tribal mineral lease not subject to taxation); *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. at 691 (Indian traders on reservations are immune from state taxes); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 93 S.Ct. 1257, 1259, 36 L.Ed.2d 129 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 35 L.Ed.2d 114 (1973) (state may not tax individual incomes of Indians derived from reservation sources); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145-198, 100 S.Ct. 2578, 1288, 65 L.Ed.2d 665 (1980) (state may not impose use fuel taxes on non-Indian logging company for logging and hauling performed on Indian lands); *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 165, 100 S.Ct. 2592, 2596, 65 L.Ed.2d 684 (1980) (state gross receipts tax invalidated for on-reservation sale of goods to Indian tribe); *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832, 102 S.Ct. 3394, 3396, 73 L.Ed.2d 1174 (1982) (state may not tax gross receipts of non-Indian construction company received from Tribe for work on reservation); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985) ("Indian tribes and individuals generally are exempt from taxation within their own territory"); *Montana v. Crow Tribe of Indians*, 484 U.S. 997, 108 S.Ct. 685, 98 L.Ed.2d 683

(1988) summarily aff'g sub nom *The Crow Tribe of Indians v. Montana*, 819 F.2d 895, 903 (9th Cir. 1987) (taxing of Indian reservation lands or Indian income from activities carried out within reservation boundaries not permissible absent Congressional consent); *Rev. Rul. 67-284, 1967-2 C.B. 55* ("Income tax statutes do not tax Indian tribes. The tribe is not a taxable entity.") *See also Bryan v. Itasca County* 426 U.S. 373, 375-378, 392-393, 96 S.Ct. 2102, 2104-2106, 2112-2113, 48 L.Ed.2d 710 (1976); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-76, 96 S.Ct. 1634, 1642-1643, 48 L.Ed.2d 96 (1976).

Oklahoma's putative basis for seeking review is that Indian tribal members and the Indian tribe incidentally benefit from the roads built and maintained by the taxes that Oklahoma would impose on the tribe. (*See, e.g.*, Pet. at 44.) Again, this is not a new or novel complaint by states frustrated by lack of authority to tax Indian tribes. This argument has been made before and is simply immaterial. That people beyond the taxing authority of a state incidentally benefit from state public improvements does not generate any new taxing jurisdiction for states. Oklahoma could make the same argument for taxing Kansas, Texas, New Mexico, Colorado, Arkansas or Louisiana, because citizens in these states and (undoubtedly) the states themselves incidentally benefit from the roads in Oklahoma.

Beyond the immateriality of this argument is that Oklahoma is not telling the full story. Roads in Oklahoma (particularly those that incidentally benefit the tribe and tribal members) include many built and maintained because of treaty obligations the federal government owes Indian tribes. *Amicus*, like Respondent and other

Indian tribes, gave up many valuable rights to the federal government. In exchange, the federal government made many promises to *amicus*, as the federal government did to Respondent and other Indian tribes, including that Indian tribes would not be subject to state taxation. Under federal Law, *amicus* retained rights to public highways or roads along section lines and "elsewhere whenever necessary for the public good."[10] The federal and tribal governments have constructed and maintained many roads. *See e.g.*, 25 C.F.R. §§ 170.1 *et seq.* As a result of these treaty provisions and other federal laws, many roads have been built and maintained that directly benefit Oklahoma and its citizens.[11]

In a survey of the Five Nations,[12] the Oklahoma State Indian Affairs Commission concluded that these tribal governments "produced direct total expenditures of $92.2 million dollars from federal and own resources" in 1990. Further, the Commission found that "including Medicaid, AFDC and the **highway program**, the State of Oklahoma

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[10] *See* Act of June 30, 1902, ch. 1323, § 10.

[11] A recent article about the federal Indian road program was appropriately headlined: "Obscure Indian Road Program Spends Millions," published May 29, 1994, on page 23 of Section A to *The Sunday Oklahoman* ("this year . . . the Muscogee [area] office divided $13.3 million among the tribes it serves, according to BIA figures").

[12] The Respondent and Amicus are two of the Five Nations. The others are the Seminole, the Choctaw Nation, and the Cherokee Nation.

collected a total of $1.567 billion dollars in federal grants" in 1991.[13]

According to the Bureau of Indian Affairs ("BIA"), the projected figures for 1994 obligate $3,756,000 in federal monies to the Anadarko Area[14] for the building and maintenance of roads in that area. In the Muskogee Area, $13,410,000 in federal monies have been obligated by the federal government in order to construct and maintain roads and highways in 1994. Additional contributions of $934,000 and $436,000 have been made to Anadarko and Muskogee areas, respectfully. These contributions do not include emergency funding contributions made periodically throughout 1994.[15]

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[13] "Economic Impact of Tribal Tax and Expenditure programs in the State of Oklahoma," Summary of Findings Prepared for the George Washington University Center for Native American Studies and Indian Policy Developments and the Oklahoma State Indian Affairs Commission, p. 6 (Jan. 1992) citing Advisory Commission of Intergovernmental Affairs, *Significant Features of Fiscal Federalism: Volume 2: Revenues and Expenditures*; October, 1991, p. 53 (emphasis added).

[14] The BIA has two area offices in Oklahoma. The Anadarko Area Office services tribes in Western Oklahoma. The Muskogee Area Office services the Eastern tries, *i.e.*, essentially the Five Nations. *Cf.* 25 U.S.C.A. § 40; 25 C.F.R. § 11.1, ¶¶ (a)(19) and (a)(23).

[15] These figures were provided by the Bureau of Indian Affairs, Anadarko Area, but have yet to be finalized and reconciled with the actual federal spending. This will be done at the opening of the 1995 calendar year.

These figures simply give the lie to Oklahoma's implication that Indian tribes are getting and will continue to get a "free ride"[16] unless Oklahoma has authority to tax tribes. If anything, Oklahoma is benefiting from the presence of Indian tribes far in excess of any incidental benefits that untaxed tribes receive from roads built and maintained by Oklahoma.

Legislative Not Judicial Response Available

In finding that the incidence of the Oklahoma motor fuel tax was upon the Indian tribe, the Tenth Circuit implied that Oklahoma could obtain the fuel tax revenues by legislatively changing who bears the incidence of the tax.

> [A] nondiscriminatory tax imposed on the non-exempt private entities that do business with Indian tribes and that pass the cost of those taxes on to the tribe does not violate tribal sovereign immunity.

Chickasaw Nation v. Oklahoma Tax Commission, 31 F.2d at 970.

Thus, Oklahoma can unilaterally respond to the Tenth Circuit opinion (assuming any response is necessary) without asking this court to overturn 200 years of case law holding that states cannot tax Indian tribes. Oklahoma's need for this heretofore unauthorized taxing authority simply does not exist.

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[16] *See, e.g.*, Pet. at 15. "It is the existence of state funded public highways that makes possible the Tribe's sale of fuel . . . "

CONCLUSION

Oklahoma's petition for *certiorari* should be denied.

Respectfully Submitted

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